Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No. 79-102

In the

Supreme Court of the United States

OCTOBER TERM, 1978

MARION A. SAJDAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

SUBJECT INDEX

Judgment and Opinion of the Court Below 2

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Statutes Involved 6

Reasons for Granting the Writ 7

I. The Trial Judge Improperly Questioned The Truth Of The Facts Alleged In Petitioner's Affidavit In Denying Petitioner's Motion To Recuse 7

II. The Court Below Failed To Apply The Objective Standard Of Title 28, United States Code, Section 455(a) In Determining Whether The Trial Judge's Impartiality Might Reasonably Be Questioned 9

III. Failure Of The Trial Judge To Disqualify Himself Constituted A Denial Of Petitioner's Due Process Rights 18

Conclusion 19

Appendix 1a

Unpublished Order of Court Below Affirming District Court's Judgment 1a

Order Denying Petition for Rehearing 2a

Motion to Recuse Trial Judge 3a

Affidavit in Support of Motion to Recuse Trial Judge 4a

PAGE

Certificate of Good Faith 5a

Written Notice of Claimed Violations of Probation 6a

Trial Court's Findings of Fact Based on the Probation Revocation Hearing of November 13, 1978 ..... 8a

Table Of Authorities Cited

Cases

Berger v. *United States*, 255 U.S. 22, 41 S.Ct 230 (1921) 9

Davis v. *Board of School Com'rs. of Mobile County*, 517 F.2d 1044 (5th Cir. 1975) 10, 14

Hawaii-Pac Venture Capital Corp. v. *Rothbard*, 437 F. Supp. 230 (D.C. Hawaii 1977) 10

In Re: Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 18

Mims v. *Sharp*, 541 F.2d 415 (3rd Cir. 1976) 9

Parrish v. *Board of Com'rs. of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975) 14

Pfizer, Inc. v. *Lord*, 456 F.2d 532 (8th Cir. 1972) 18

Public Utilities Commission v. *Pollack*, 343 U.S. 451, 72 S.Ct. 813 (1952) 13

SCA Services, Inc. v. *Morgan*, 557 F.2d 110 (7th Cir. 1977) 11

United States v. *Brown*, 539 F.2d 467 (5th Cir. 1976) .. 11

United States v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976) ..9, 18

United States v. *Womack*, 454 F.2d 1337 (5th Cir. 1972) 9

Webbe v. *McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977) 15

PAGE

Statutes

Title 28, United States Code, Section 144 .....6, 7, 10, 18

Title 28, United States Code, Section 455(a) ..6, 9, 10, 14, 18

Other References

U. S. Code Cong. & Admin. News, 1974, pages 6354-6355 10

Due Process Clause, Amendment V of the United States Constitution 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on April 10, 1979, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on November 13, 1978, revoking petitioner's probation and sentencing him to the custody of the Attorney General of the United States for a period of three years and six months.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on November 13, 1978, and the trial judge's findings of fact entered on November 28, 1978 is set forth in the Appendix. The unpublished order of the United States Court of Appeals for the Seventh Circuit affrming the judgment of the District Court was filed on April 10, 1979, No. 78-2493, and is set forth in the Appendix.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was filed on April 10, 1979, and a timely petition for rehearing was denied on June 21, 1979. The jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Did the trial judge improperly question the truth of the facts alleged in petitioner's affidavit in denying petitioner's motion to recuse?
2. Did the court below improperly fail to apply the objective standard of Title 28, United States Code, Section 455(a) in determining whether the trial judge's impartiality might reasonably be questioned?
3. Did the failure of the trial judge to disqualify himself constitute a denial of petitioner's due process rights?

STATEMENT OF THE CASE

The petitioner was originally charged in an eight count indictment on February 20, 1975 charging violation of the mail fraud statute, 18 U.S.C. §1341 (R.1[1]). On September 10, 1975, he entered pleas of guilty to four counts of the indictment, and the remaining counts were dismissed (R.3). He was placed on probation for a period of five years with the first six months to be spent at the Chicago Metropolitan Correction Center for special treatment.

On May 6, 1976, pursuant to the court's own motion for a Rule to Show Cause Why Probation Should Not Be Revoked, the petitioner was committed to the custody of the Attorney General for imprisonment for five years on each of the four counts to run consecutively (R.4).

On August 13, 1976, his probation was reinstated for a period of five years on the following conditions:

a. That defendant continue psychiatric treatment;

b. That defendant refrain from the use of credit cards;

c. That defendant obtain probation office approved employment;

d. That defendant turn over any checkbooks and money orders in his possession to the probation officer; and

e. That defendant make periodic reports to the probation officer. (R.5)

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[1] "R" refers to the Common Law Record filed in the court below.
"Supp. R." refers to the Supplemental Record filed in the court below.
"T" refers to the Transcript of Proceedings of the trial court filed in the court below.

Another Rule To Show Cause was filed on January 3, 1977 (Supp. R.2). On June 10, 1977, the court discharged the Rule To Show Cause and added two additional conditions to the petitioner's probation:

a. That defendant have no checking accounts without permission of his probation officer; and

b. That defendant make restitution on all bad checks written while defendant was on the work release program. (R.6)

The Rule To Show Cause that is the subject of this proceeding was filed by the Government on August 21, 1978 (Supp. R.3). A written notice of the claimed violations was filed on September 6, 1978 (R.7).

The probation revocation hearing was held on November 13, 1978. Before the hearing began, the petitioner filed a motion to recuse the trial judge; and the trial judge denied said motion (R.8)[2].

As its first witness, the Government called the petitioner's probation officer, Rosemary Demore, who testified to conversations she had with the petitioner relating to bad checks given by him to Dominick's (T.22) and Polk Bros. (T.23). She also said that the petitioner did not ask permission of her to open checking accounts at Continental Illinois National Bank, Harris Bank, Uptown National Bank or the Tollway National Bank (T. 24).

Donald Magnuson, a security agent for Dominick's Finer Foods, identified three checks cashed by the petitioner at Dominick's which were marked "account closed" and returned unpaid to Dominick's by the banks (T. 37-38).

[2] The motion to recuse is set forth in the Appendix.

The three checks were subsequently paid on August 12, 1978 (T. 39, 43).

Steven M. Oltman, a helicopter pilot, identified the petitioner as the person he took on two helicopter flights on June 27, 1978 (T.44-45). The checks received by him from the petitioner in payment of the flights were returned from the bank and marked account closed (T. 47, 49).

After calling these three witnesses, the Government rested its case (T. 50).

Over objection of the defense, the court then called the petitioner as a witness (T. 51). The petitioner stated that since June 10, 1977, he had opened checking accounts at the Continental and Harris Banks (T. 52). When the petitioner attempted to explain his intentions, the court stated "Never mind about the intention . . . " (T. 53).

The defense called Morton Friedman, an attorney for the Illinois Department of Law Enforcement, (T. 66), who testified relating to assistance given his department by the petitioner (T. 67-68). He also stated that in his opinion the petitioner's probation should not be revoked (T. 69).

Mark Hinchy, a special agent for the Illinois Department of Law Enforcement, testified to the help given him by the petitioner (T. 71-73). He also stated that he did not think the petitioner was a danger to society and that the petitioner had been of great benefit to his department (T. 74).

The petitioner also testified in his own behalf (T. 74-79).

At the close of the evidence both Mr. Friedman and the Government urged the court not to revoke the petitioner's probation (T. 80-82).

Notwithstanding these recommendations, the trial judge did revoke the petitioner's probation (T. 89) and sentenced him to prison for a period of three years and six months (T. 95).

STATUTES INVOLVED

Title 28, United States Code, Section 144:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Title 28, United States Code, Section 455(a):

> "(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

REASONS FOR GRANTING THE WRIT

I. The Trial Judge Improperly Questioned The Truth Of The Facts Alleged In Petitioner's Affidavit In Denying Petitioner's Motion To Rescue.

On the day of the probation revocation hearing, the petitioner filed a motion to recuse the trial judge pursuant to the provisions of Title 28, United States Code, Section 144 alleging that he believed the trial judge would be prejudiced and biased toward him because the United States Attorney had revealed to the trial judge that on another occasion the petitioner had given a sum of money to a third person to give to the trial judge as consideration for not revoking his probation. Petitioner's probation was not revoked on that occasion.

In commenting on the petitioner's affidavit in support of his motion to recuse, the trial judge stated as follows (T. 4-6):

> "The Court: The fact of the matter is that on that date this matter was set for a hearing for the same reason that the defendant is here today on the question as to — after the matter had been continued, I don't know how many different times; the docket will show how many times it had been continued.
>
> I had no prior notice whatever that anyone would come to my chambers and appear in this matter without the defendant being present. The fact of the matter is that the District Attorney and Mr. Schippers[3] did make an appearance in my chambers. The defendant — I asked, after I found out what the subject of the matter, I mean, the subject matter that was going to be discussed was, I asked where the defendant was. I was told that he was in the building. There isn't any question that at that time — *I haven't gone through this affidavit carefully to see whether it spells out in detail what did occur but there isn't any question but that at that time I was at least apprised general-*

[3] An attorney for the petitioner in the trial court.

ly of the fact that your client had made some allegations to the effect that in connection with a prior probation matter in this case that he had succeeded in getting me not to revoke his probation on the basis he had turned over some sum of money to me, there is no question about it. I had no prior intimation before that information was disclosed to me at that time that any — I thought that it was a pro forma request for a continuance or something of that type. I had no prior notice at all. I received no details as to how this information reached Mr. Schippers or Mr. Sullivan[4] or how it came to their attention. I mean, I received no detail as to — at least I don't recall it, so these facts are before me, or were brought before me. There is no question about it.

Now, they affect my personal integrity and I expect to go ahead with your client today and let him make any explanation he would like to with reference to any information that he may have which allegedly was passed on to somebody in this case to the effect that he succeeded in a prior instance in getting me not revoke his probation.

I certainly, under the circumstances of this case, where an allegation has been made that I have been bribed once in this case, I certainly am not going to recuse myself from acting and going through with this matter on the basis that someone makes a baseless allegation against me that impugns my integrity and, by doing that, expects me to recuse myself from further consideration of the case. Now, the evidence is here and I am prepared to go ahead." (Emphasis Added)

In deciding to deny the motion to recuse because the allegations were "baseless", the trial judge was not following the proper standard in determining whether or not to disqualify himself. Contrary to decisions of this court and other reviewing courts, the trial judge was passing

[4] The United States Attorney for the Northern District of Illinois.

upon the truth or falsity of the facts alleged in the affidavit rather than merely determining the legal sufficiency of the allegations. The trial judge in the case at bar at no time stated that the allegations were legally insufficient. See this court's opinion in *Berger* v. *United States*, 255 U.S. 22, 41 S.Ct. 230 (1921). To the same effect, see *United States* v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976), *United States* v. *Womack*, 454 F.2d 1337 (5th Cir. 1972).

See also the case of *Mims* v. *Sharp*, 541 F.2d 415 (3rd Cir. 1976) which held that on a motion for disqualification of a judge based on bias or prejudice, it is the duty of the judge to pass only on the legal sufficiency of the facts alleged to ascertain whether they support a charge of bias or prejudice; and neither the truth of the allegations nor the good faith of the pleader may be questioned, regardless of the judge's personal knowledge to the contrary.

Since the trial judge in the case at bar did consider the fact that the allegations in the affidavit were "baseless" in reaching his decision to deny the motion to disqualify, he was acting improperly and his decision should be reversed.

II. The Court Below Failed To Apply The Objective Standard Of Title 28, United States Code, Section 455(a) In Determining Whether The Trial Judge's Impartiality Might Reasonably Be Questioned.

In affirming the decision of the trial court, the court below stated: "The fact of bias or prejudice must be identified specifically by time, place, occasion and circumstances of the occurrence of such attitude." By so ruling, the court below was ignoring the provision of Title 28, U.S.C. §455(a) which provides:

> "Any justice, judge, magistrate or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Although the motion to recuse was filed pursuant to Title 28, U.S.C. §144, the court below should have also considered the provisions of Title 28, U.S.C. §455(a) inasmuch as the provisions of these two sections are to be considered *in pari materia.* See *Davis* v. *Board of School Com'rs of Mobile County,* 517 F.2d 1044 (5th Cir. 1975) and *Hawaii-Pac Venture Capital Corp.* v. *Rothbard,* 437 F. Supp. 230 (D.C. Hawaii 1977).

The legislative history of 28 U.S.C. §455(a) shows that the effect of this Act was to substitute an objective standard for a subjective standard in determining whether a judge's impartiality might reasonably be questioned. See U.S. Code Cong. & Admin. News, 1974, pages 6354-6355 wherein it is stated:

> "Subsection (a) of the amended section 455 contains the general, or catch-all, provision that a judge shall disqualify himself in any proceeding in which 'his impartiality might reasonably be questioned.' This sets up an objective standard, rather than the subjective standard set forth in the existing statute through use of the phrase 'in his opinion.' This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. The language also has the effect of removing the so-called 'duty to sit' which has become a gloss on the existing statute. See *Edwards* v. *United States* (5th Cir. 1964) 334 Fed. 360. Under the interpretation set forth in the *Edwards* case, a judge, faced with a close question on disqualification, was urged to resolve the issue in favor of a 'duty to sit'. Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this 'duty to sit' would enhance public confidence in the impartiality of the judicial system."

In a case interpreting the application of 28 U.S.C. §455(a), *SCA Services, Inc.* v. *Morgan,* 557 F.2d 110 (7th Cir. 1977), the Seventh Circuit stated at page 116:

> "The third reason suggested for Judge Morgan's disqualification is that the judge's impartiality might reasonably be questioned under the broad and liberal purposes sought to be achieved by 28 U.S.C. §455(a). Although the statute enunciates the appearance of partiality as the general standard for judicial recusal and the legislative history suggests that this standard is determined by reference to the reasonable person, no factual or concrete examples of the appearance of impartiality were provided in the Congressional debates. Moreover, because a judge must apply the standard both as its interpreter and its object, the general standard is even more difficult to define. In spite of the philosophical dilemma created by this objective-subjective conundrum, it is clear to this Court that there exists a reasonable basis for the finding of the appearance of partiality under the facts and circumstances of this case."

See also the Fifth Circuit case of *United States* v. *Brown,* 539 F.2d 467 (5th Cir. 1976), wherein the court stated:

> "The truth pronounced by Justinian more than a thousand years ago that, 'Impartiality is the life of justice,' is just as valid today as it was then. Impartiality finds no room for bias or prejudice. It countenances no unfairness and upholds no miscarriage of justice. Bias and prejudice can deflect the course of justice and effect the measure of its judgments. If the judge finds himself possessed of those sentiments, he should recuse himself; or, if he does not, confront the likelihood of proceedings under the statute to require him to do so.

"The Supreme Court in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed 942, said:

> 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always *endeavored to prevent even the probability of unfairness* . . . Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio*, 273 U.S. 510, 532 [47 S.Ct. 437, 444, 71 L.Ed 749]. [T]o perform its high function in the best way *"justice must satisfy the appearance of justice."* *Offutt* v. *United States*, 348 U.S. 11, 14 [75 S.Ct. 11, 13, 99 L.Ed. 11].' [Emphasis supplied]

"Citing *Murchison*, the court in *Knapp* v. *Kinsey*, 6th Cir., 232 F.2d 458, stated:

> 'One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case.'

"In *Rapp* v. *Van Dusen*, 3 Cir., 350., F.2d 806, 812, the court declared that:

> 'For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality.'
>
> *"Like statements of the principle as to the 'appearance of justice,' within the fair trial concept, are found in many other decisions and have now been codified in the new recusal statute, which requires mandatory disqualification of a judge 'in any proceeding in which his impartiality might reasonably be questioned,' or 'where he was a personal bias or prejudice concerning a party.' To say more will unduly lengthen this decision."* 539 F.2d at pages 469, 470. (Emphasis Added)

As Mr. Justice Frankfurter said in the case of *Public Utilities Commission* v. *Pollack*, 343 U.S. 451, 72 S.Ct. 813 (1952):

> "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. *But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."* 72 S.Ct. at 822-823. (Emphasis Added)

In the case at bar, the trial judge's feelings were apparent by his taking an active role in the hearing by asking numerous questions of witnesses (T.24-25, 30-32, 38-39, 42, 48-49, 69-73), by calling the petitioner as a witness even though the Government chose not to call him

(T.51-56); and when the petitioner testified in his own behalf, the court interrogated even though the prosecution did not cross-examine him (T.77-79); and the court also told the petitioner he was not interested in his intentions when the petitioner attempted to explain his actions (T.53).

The feelings of the trial judge were also manifested by his references to the fact that the allegations impugned his personal integrity. (T.5-6) It is obvious that the trial judge believed that he had a "duty to sit" in the instant case in order to defend himself against these allegations that impugned his personal integrity and to demonstrate to the public that his integrity was above approach. Under these circumstances the trial judge had a duty to disqualify himself rather than a "duty to sit."

In stating in its order that the defendant's "allegation that the judge would be prejudiced upon learning of the attempted bribery is only a suggested inference," the court below overlooked the "reasonable factual basis—reasonable man test" in determining whether the trial judge should have disqualified himself. That the trial judge himself felt some discomfort upon learning of the bribe allegations is apparent from his statement to the effect that he would have preferred "to be sitting here today with no knowledge whatever of the facts that have been brought before me." (T. 14-15)

The appropriate test for disqualification under 28 U.S.C. §455(a) is whether a reasonable person knowing all of the circumstances would be led to the conclusion that the judge's "impartiality might reasonably be questioned." See *Parrish* v. *Board of Com'rs of Alabama State Bar*, 524 F.2d 98 (5th Cir. 1975); *Davis* v. *Board of School Com'rs of Mobile County*, 517 F.2d 1044 (5th Cir. 1975).

Applying the reasonable person standard to the facts of the case at bar, it is clear that as a result of the disclosure of the bribe allegations to the trial judge, there exists a reasonable basis for a finding of the appearance of partiality especially in view of the Government's disclosure to the judge of verification from a source independent of the petitioner that the petitioner had indeed passed $5,000 to a third person for the purpose of giving it to the trial judge. Appearance of impartiality is virtually as important as the fact of impartiality. *Webbe* v. *McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977).

Under such circumstances a reasonable belief would certainly arise that the trial judge would be inclined to conduct himself in the pending proceedings in such a manner to show that he had not in fact been bribed on behalf of the petitioner, and by doing so his impartiality might reasonably be questioned. This was apparent in the case at bar by the judge's refusal to follow the recommendations of the United States Attorney and Illinois Department of Law Enforcement not to revoke the petitioner's probation, his active role in the proceedings and the severity of the sentence imposed.

In determining the validity of the motion to recuse filed by the petitioner, this court should bear in mind the fact that it was the United States Attorney who brought the bribe allegations to the attention of the trial judge and not the petitioner. In doing so, the United States Attorney told the trial judge that he felt he was obligated to tell the judge of the bribe allegations even though it might necessitate the trial judge having to recuse himself.

At the outset of the hearing, the Assistant United States Attorney stated to the court (T.7-8):

> "Mr. Jones: I would comment from my own reaction first, your Honor, since somewhat these allegations did come initially to me or I was brought into the discussion of them and *I think from what has transpired so far that it is a matter of concern only to the government because of the appearance.* None of the evidence or anything that we have encountered at this point shows in any way that your Honor was influenced, was affected, ever received any money, and that is the position that the government has taken from the outset in this matter.
>
> Our concern in initially not disclosing it to your Honor was partly one of the reasons that we have here today and that was *we felt that if there was any discussion of it with your Honor it would give an appearance that might raise a conflict question in which your Honor would have to be recused.* I believe, apparently at the point of November 3rd when the matter had already been continued once before your Honor, and there was, at that point there was no way the proceeding could apparently be continued without some disclosure to your Honor, the decision was made that we would have to go in and explain to your Honor. *Of course, by so doing, we raise exactly the problem that Mr. Rotenberg has raised in his motion which we had initially tried to avoid and that was one of giving some appearance so that it would be thought possibly a conflict or that it would be improper for your Honor to proceed in the matter and that because of those events it has come to this particular occasion.*" (Emphasis Added)

The Assistant United States Attorney also read into the record a prepared statement from the United States Attorney (T.8-9):

> "In September, 1978, pursuant to the request of the State's Attorney of Cook County and the Director of the Illinois Department of Law Enforcement, the United States Attorney agreed to join with the State's Attorney and the Director in urging your Honor not to terminate Mr. Sajdak's probation and sentence him to the penitentiary. Since then Mr. Sajdak has conferred and cooperated with agents of the Federal Bureau of Investigation in connection with certain other investigations. *We have information that in 1977 Mr. Sajdak paid $5,000 to a person who was to pass the money along through other persons and eventually to your Honor in order to assure a favorable outcome to Mr. Sajdak's then pending petition to revoke probation. We have some evidence independent of Mr. Sajdak's word which leads us to believe that Mr. Sajdak did pay money for this purpose.* We do not have any evidence nor do we believe that your Honor had any involvement in or knowledge of this matter. We will present the evidence with respect to the pending to revoke Mr. Sajdak's probation, *however, because of the commitment Mr. Sullivan made in September, 1978, we will urge your Honor to not terminate Mr. Sajdak's probation. We leave it to your Honor's best judgment as to whether or not wisdom dictates that your Honor recuse himself from further consideration of this case.*" (Emphasis Added)

Therefore, it is apparent that the Government Attorneys also believed that a disclosure of the bribe allegations to the trial judge would create an atmosphere where the judge's impartiality might reasonably be questioned which of course would necessitate the trial judge having to disqualify himself from hearing the pending probation revocation proceedings.

Therefore, upon being apprised of the bribe allegations, the trial judge should have followed the mandate

of Title 28, U.S.C. §455(a) and disqualified himself. His failure to do so constituted an abuse of discretion.

III. Failure Of The Trial Judge To Disqualify Himself Constituted A Denial Of Petitioner's Due Process Rights.

Regardless of whether the petitioner's motion to recuse was brought pursuant to the provisions of Title 28, United States Code, Section 144 and regardless of whether the court below should have also considered the provisions of Title 28, United States Code, Section 455(a), the failure of the trial judge to disqualify himself constituted a denial of petitioner's rights pursuant to the Due Process Clause, Amendment V of the United States Constitution.

The right to a tribunal free from bias or prejudice is based, not on the statutes, but on the Due Process Clause, *United States* v. *Sciuto*, 531 F.2d 842 (7th Cir. 1976), since freedom of the tribunal from bias or prejudice is an essential element of due process, *In Re Murchison*, 349 U.S. 133, 75 S.Ct. 623 (1955).

For the reasons previously stated herein, it is obvious that the petitioner herein did not receive a trial by a tribunal that was free from bias or prejudice.

As was stated in the case of *Pfizer, Inc.* v. *Lord*, 456 F.2d 532 (8th Cir. 1972):

> "It is important that the litigant not only actually receive justice, but that he believe that he has received justice. A judge, like Caesar's wife, should be above suspicion." 456 F.2d at page 544.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued April 9, 1979)
April 10, 1979

Before

Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. William J. Jameson, *Senior District Judge**

No. 78-2493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MARION A. SAJDAK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 75-Cr-97
Bernard M. Decker, *Judge.*

O R D E R

The Court, having read the briefs, addressed itself to the record, heard oral argument on behalf of both the appellant and the appellee, and conferred at the bench, announced in open court that the judgment appealed from is AFFIRMED.

Appellant has not established that the district court acted improperly in denying the defendant's motion under 28 U.S.C. § 144 to recuse trial judge. The mere filing of an

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* Senior District Judge William J. Jameson of the United States District Court for the District of Montana is sitting by designation.

affidavit of disqualification does not automatically require a judge to disqualify himself. Defendant's allegation that the judge would be prejudiced upon learning of the attempted bribery is only a suggested inference. The fact of bias or prejudice must be identified specifically by time, place, occasion, and circumstance of the occurence of such attitude. There is no evidence in the record that the trial judge abused his discretion.

Accordingly, the Clerk of this Court is directed to enter judgment AFFIRMING the judgment appealed from.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 21, 1979
Before
Hon. Thomas E. Fairchild, *Chief Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. William J. Jameson, *Senior District Judge**
No. 78-2493

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
MARION A. SAJDAK,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 75-Cr-97
Bernard M. Decker, *Judge.*

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* Senior District Judge William J. Jameson of the United States District Court for the District of Montana is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in regular active service having requested a vote on the suggestion for rehearing *en banc*, and all judges on the original panel having voted to denying a rehearing,

IT IS ORDERED, that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 75 CR 97

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MARION SAJDAK,
a/k/a THOMAS BUFFO,
Defendant.

MOTION TO RECUSE TRIAL JUDGE

NOW COMES the Defendant, MARION SAJDAK, a/k/a THOMAS BUFFO, pursuant to the provisions of Title 28, §144, United States Code, and moves that Judge Bernard M. Decker recuse himself from hearing the instant matter for the reason that said Judge is biased and prejudiced against him as is more fully set forth in the Affidavit attached hereto.

Marion Sajdak, a/k/a Thomas Buffo

JEROME ROTENBERG
7 South Dearborn Street
Chicago, Illinois 60603
726-1678
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 75 CR 97

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARION SAJDAK,
a/k/a THOMAS BUFFO,

Defendant.

AFFIDAVIT IN SUPPORT OF
MOTION TO RECUSE TRIAL JUDGE

MARION SAJDAK, a/k/a THOMAS BUFFO, being first duly sworn on oath, deposes and says:

1. That he is the defendant in the above-captioned cause.

2. That he is informed and believes that recently, the exact date of which is unknown to him, certain members of the United States Attorneys' Staff met in chambers with Judge Bernard M. Decker, at which time the following prejudicial information was revealed to the Judge relating to him and which would cause said Judge to be biased and prejudiced against him:

(a) That he (Sajdak) had advised certain law enforcement officers that the reason his probation was continued and not revoked on June 10, 1977 by Judge Decker was because that prior to June 10, 1977, he (Sajdak) had given a large sum of money to an individual to give to Judge Decker as consideration for Judge Decker not revoking his probation.

(b) That the United States Attorneys' Office had verified the fact that a sum of money had, in fact, been given by him to said individual.

(c) That the United States Attorneys did not believe that any of the money had been given to Judge Decker.

(d) That there are two investigations presently pending as to his (Sajdak) involvement in the possible violation of United States Criminal Statutes.

(e) That the United States Attorneys suggested that Judge Decker disqualify himself from hearing the instant matter now pending before him.

3. That he first received knowledge of the fact that the information referred to in Paragraph 2 had been related to Judge Decker on November 8, 1978 when he was informed of this fact by his attorney.

4. That as a result of the matters referred to in Paragraph 2 herein having been revealed to Judge Decker, he believes that said Judge is biased and prejudiced toward him to such an extent that he cannot receive a fair hearing in the instant matter.

FURTHER AFFIANT SAITH NOT.
SUBSCRIBED AND SWORN TO
before me this ——— day
of ———————, 1978.

NOTARY PUBLIC

IN THE UNTED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 75 CR 97

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARION SAJDAK,
a/k/a THOMAS BUFFO,

Defendant.

CERTIFICATE OF GOOD FAITH

JEROME ROTENBERG, attorney of record for the defendant herein, hereby certifies that the foregoing Affidavit In Support Of Motion To Recuse Trial Judge is

made in good faith, and that the matters referred to in Paragraph 2 of said Affidavit were revealed to him on November 8, 1978.

Jerome Rotenberg
Attorney for Defendant
7 South Dearborn Street
Chicago, Illinois 60603
726-1678

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 75 CR 97

UNITED STATES OF AMERICA

vs.

MARION SAJDAK

WRITTEN NOTICE
OF CLAIMED VIOLATIONS ON PROBATION

Pursuant to the recent case of *United States* v. *Lupe Davila*, 573 F.2d 986 (7th Cir. 1978), the government hereby provides the probationer and this court written notice of the alleged violations of probation to be heard at the final hearing on September 21, 1978.

At the hearing, the government will prove up conduct by the probationer which violates both state law and the conditions of his probation. The evidence will show that Mr. Sajdak passed bad checks (on closed accounts and/or accounts with insufficient funds) knowing that those checks would not be paid by the bank when presented by the payees for payment. His conduct violates the deceptive practices of the Illinois state laws, Chapter 38, Section 17(1)(d), Illinois Revised Statutes. The passing of these bad checks also violates special conditions of Mr. Sajdak's probation imposed on August 31, 1976, at which time Mr. Sajdak was ordered to turn over to the probation officer any checkbooks and money orders in his possession, and on June 10, 1977, at which time Mr. Sajdak was ordered

to have no checking accounts without the probation officer's permission. The evidence will show that Mr. Sajdak's probation officer never gave him permission to have any checking accounts, and that notwithstanding that Mr. Sajdak opened an account at the Continental Bank under his new name Thomas A. Buffo, and then wrote a check or checks to Polk Bros. after that account was closed. Mr. Sajdak also opened checking accounts at the Tollway National Bank, Uptown National Bank of Chicago and the Drovers National Bank of Chicago, in 1976 and/or 1977, and wrote checks on those accounts to Dominick's after those accounts had been closed.

In June or July 1978, the probationer gave two similarly bad checks to Francine Zeidman.

Copies of these checks as well as a copy of the probation officer's Special Report of August 2, 1978, to the court, are available for inspection in the United States Attorney's Office. The Special Report spells out in even more detail the particulars of the matters set out above.

Respectively submitted,

THOMAS P. SULLIVAN
United States Attorney
By:
ROBERT L. HERBST
Assistant United States Attorney

RLHerbst:jjp
(353-4129)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
No. 75 CR 97

UNITED STATES OF AMERICA

vs.

MARION SAJDAK

FINDINGS OF FACT BASED ON THE PROBATION REVOCATION HEARING OF NOVEMBER 13, 1978

On November 13, 1978, following due notice, a hearing was held pursuant to a Rule to Show Cause Why the Probation of Marion Sajdak Should Not Be Revoked. Based on the evidence presented at this hearing by the government and the defendant, I make the following findings of fact:

1. On October 28, 1975, I sentenced the defendant to a five-year period of probation, the first six months of which were to be served in a community treatment facility for violation of Title 19, United States Code, Section 1341.

2. On August 31, 1976, I imposed several special conditions of probation, including a requirement that the defendant turn over to his probation officer all checkbooks in his possession.

3. On June 10, 1977, I added further special conditions of probation, including the requirement that the defendant receive permission from his probation officer to open any checking accounts, and that the defendant pay monthly restitution on specific checks.

4. The defendant opened and used checking accounts at the Continental Illinois Bank, the Tollway National Bank, and the Harris Bank, all without notifying or receiving permission of his probation officer.

5. The defendant wrote three checks to Chicago Helicopter Airways on June 14, 1978 and June 27, 1978, all of which were bad checks because they were drawn on two checking accounts that had been closed.

6. The defendant wrote three checks to Dominick's Finer Food stores in December, 1976, on April 2, 1977 and on April 11, 1977, all of which were bad checks because each was drawn on a checking account that had been closed.

CONCLUSIONS

The Court finds that the defendant Marion Sajdak has violated his probation by:

1. Not turning his checkbooks over to his probation officer; and/or

2. Not seeking permission from or notifying his probation officer that he was opening checking accounts; and

3. Passing bad checks in violation of state law. *Ill. Rev. Stats.* Ch. 38 § 17(1)(d).

Based on these findings of fact and conclusions, I have ordered that the probation of the defendant Marion Sajdak be revoked.

ENTER:

/s/ BERNARD M. DECKER
BERNARD M. DECKER
U.S. DISTRICT COURT JUDGE

Supreme Court, U. S.
FILED
SEP 17 1979
MICHAEL RODAK, JR., CLERK

No. 79-102

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARION A. SAJDAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN VOORHEES
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-102

MARION A. SAJDAK, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1979. A petition for rehearing was denied on June 21, 1979 (Pet. App. 2a-3a). A petition for a writ of certiorari was filed on July 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district judge properly refused to recuse himself from presiding at petitioner's probation revocation hearing.

STATEMENT

Following a hearing in the United States District Court for the Northern District of Illinois, petitioner was found guilty of repeatedly violating the terms of his probation. The district court revoked petitioner's probation and sentenced him to four concurrent terms of three and a half years' imprisonment. The court of appeals summarily affirmed (Pet. App. 1a-2a).

1. Previously, in September 1975, petitioner had pleaded guilty in the same district court to four counts of mail fraud, in violation of 18 U.S.C. 1341. On October 28, 1975, the district court sentenced petitioner to four concurrent terms of five years' imprisonment. Thereafter, the district court suspended sentence and placed petitioner on five years' probation, the first six months of which were to be served at a community treatment facility. After a hearing concerning petitioner's probationary conduct in August 1976, the district court imposed several conditions on petitioner's continued probation, including a requirement that petitioner turn over all his checkbooks and money orders to his probation officer.[1] And on June 10, 1977, following still another hearing on petitioner's failure to adhere to the terms of his probation, the district court ordered petitioner to obtain permission before opening a checking account and to make restitution with regard to specific "bad" checks that he had issued (Pet. App. 8a).

Nevertheless, petitioner subsequently opened checking accounts in several Illinois banks without the permission of his probation officer. Petitioner then closed those accounts and issued a total of eight checks to three

[1]The district court also ordered petitioner to continue psychiatric treatment, to cease using credit cards, to obtain approved employment, and to make periodic reports to his probation officer.

different payees. The checks, which were drawn on various closed accounts including those opened after June 10, 1977, were returned to the payees marked "account closed." The district court concluded that petitioner had thus violated his probation by not turning over his checkbooks to his probation officer, by opening new accounts without requesting permission from his probation officer, and by passing bad checks in violation of state law (Pet. App. 6a-9a; Tr. 24, 37-38, 44-45, 47-49).

2. At the beginning of the hearing on the probation revocation, petitioner filed a motion for recusal of the district judge. The appended affidavit in support of this motion asserted that the United States Attorney's office had informed the district judge that petitioner claimed that his probation had not been revoked in June 1977 because he had arranged to pay a bribe to the district judge. The affidavit further stated that the government's investigation of this claim had verified that petitioner had transferred a large sum of money to a third party but that none of this money ever reached the district court (Pet. App. 3a-5a).

The district judge acknowledged that the United States Attorney and petitioner's counsel had informed him of the alleged bribe attempt (Pet. 7-8; Tr. 4-5). The court refused to recuse itself, however, observing that petitioner, if he wished, could explain the situation during the hearing, but that

> I certainly, under the circumstances of this case, where an allegation has been made that I have been bribed once in this case, I certainly am not going to recuse myself from acting and going through with this matter on the basis that someone makes a baseless allegation against me that impugns my

> integrity and, by doing that, expects me to recuse myself from further consideration of the case. Now, the evidence is here and I am prepared to go ahead.

(Pet. 8; Tr. 5-6).

ARGUMENT

Although petitioner does not contest the district court's conclusions regarding his violations of the terms of his probation, he raises several claims (Pet. 7-18) regarding the district judge's refusal to recuse himself. These contentions are without merit.

a. Petitioner first argues (Pet. 7-9) that the district court improperly evaluated the accuracy rather than the sufficiency of the averments contained in the affidavit supporting the recusal motion. To be sure, a district judge may not pass upon the truth of the allegations made in an affidavit of personal bias or prejudice. See, *e.g.*, *Bell* v. *Chandler*, 569 F. 2d 556, 559 (10th Cir. 1978); *United States* v. *Sciuto*, 531 F. 2d 842, 845 (7th Cir. 1976). But 28 U.S.C. 144, upon with petitioner relies, requires that the district judge consider the legal sufficiency of the affidavit before recusing himself. See, *e.g.*, *Bell* v. *Chandler*, *supra*; *United States* v. *Archbold-Newball*, 554 F. 2d 665, 682 (5th Cir.), cert. denied, 434 U.S. 1000 (1977); *United States* v. *Bray*, 546 F. 2d 851, 857 (10th Cir. 1976). And here, petitioner's vague allegations concerning an alleged bribe attempt did not adequately establish the district court's personal prejudice against petitioner. See, *e.g.*, *United States* v. *Wolfson*, 558 F. 2d 59, 62 (2d Cir. 1977); *United States* v. *Bray*, *supra*, 546 F. 2d at 857. As the court of appeals correctly observed (Pet. App. 1a-2a):

> The mere filing of an affidavit of disqualification does not automatically require a judge to disqualify himself. [Petitioner's] allegation that the judge would be prejudiced upon learning of the attempted bribery

> is only a suggested inference. The fact of bias or prejudice must be identified specifically by time, place, occasion, and circumstances of the occurrence of such attitude. There is no evidence in the record that the trial judge abused his discretion.

b. In this Court, petitioner contends for the first time (Pet. 9-18) that the district court's declination to recuse itself ran afoul of the "objective standard" of judicial impartiality set forth in 28 U.S.C. 455. Review of that fact bound question by this Court is unwarranted, especially in light of petitioner's failure to direct the court of appeals' attention to Section 455.

In any event, although the district judge might well have recused himself given his feelings that his reputation had been impugned (Tr. 6), the court of appeals did not err in affirming the district court's exercise of discretion on this point. Section 455 directs a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The inference of partiality or personal bias that may reasonably be drawn from an allegation that petitioner was willing to bribe the district court but that the court never received any money is extremely weak.[2] Moreover, contrary to petitioner's suggestions (Pet. 13-14), nothing in the record indicates

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[2]The fact that petitioner confessed to attempting such a crime is a matter that any district court could properly take into account in sentencing petitioner. See *United States* v. *Grayson*, 438 U.S. 41, 49-51 (1978). We further note that a motion to revoke petitioner's bond has recently been filed in the Northern District of Illinois because petitioner has allegedly passed still other bad checks while vacationing in the Virgin Islands.

that the judge was prejudiced against petitioner or treated him unfairly.[3] The district court did ask questions of various witnesses and also called on petitioner to testify, but all of the court's inquiries were directed to the overwhelming evidence of petitioner's violation of the terms of his probation and not to petitioner's attempted bribe.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN VOORHEES
Attorney

SEPTEMBER 1979

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[3]Petitioner misleadingly suggests (Pet. 17) that the United States Attorney believed that recusal was warranted. The government, however, expressly left that decision to the "best judgment" of the court (Pet. 17; Tr. 9).

[4]There is also no merit to petitioner's additional contention (also raised for the first time here) that he was denied due process of law (Pet. 18). Petitioner has not demonstrated either bias on the part of the district court or actual prejudice to him.

DOJ-1979-09